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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

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No. 84-1410

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JAMES R. IRVING, Director, Juvenile Division, Illinois Department of Corrections,

Petitioner,

v.

IVIE CLAY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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# RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

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The respondent, Ivie Clay, respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the opinion of the Court of Appeals for the Seventh Circuit in this case. That opinion is reported at 749 F.2d 416.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The decision below is not in conflict with this Court's opinion in Engle v. Isaac.

Petitioner suggests that the decision below either treated a failure to appeal as per se "cause" and "prejudice" under Engle v. Isaac, 456 U.S. 107 (1982), or diluted the requirements of Engle by conflating "cause" and "prejudice." On the contrary, the decision below is a straightforward application of Engle to an egregious fact situation.

The question presented in the appeal below was whether respondent's private lawyer, John Elson ("Elson"), had barred this habeas action by pursuing an amended motion

to vacate respondent's admission, instead of taking a direct appeal, in her juvenile case. The Court of Appeals was unanimous in holding that the habeas action was not barred.

Two members of the Court found that Elson had rendered constitutionally ineffective assistance, under the two-part test of Strickland v. Washington, __U.S.__, 104 S. Ct. 2052, 2054 (1984). Judge Swygert and Judge Bauer reasoned that Elson had 16 days within which to appeal after filing his appearance, and should have known that successive motions to vacate do not toll the time for appeal under Illinois law. Clay v. Director, 749 F.2d at 431. Neither judge subscribed to a view that every failure to appeal is ineffective. But both agreed that the failure to appeal was prejudicial in this case.

> We must presume that an Illinois appellate court would have responded to Clay's claims, given the decisions by both this court and the district court that she presents allegations of serious constitutional violations [by her former attorneys, two public defenders in the Juvenile Division of the Cook County Public Defender's Office], see Clay v. Director, 631 F.2d at 519-23; No. 79 C 1491, Memorandum Opinion and Order at 2-5 (N.D. Ill. May 25, 1982).

749 F.2d at 432. Accordingly, the majority of the panel found Engle's "cause" and "prejudice" standard satisfied by the ineffectiveness of Elson and the resulting loss of an opportunity to present meritorious constitutional claims in any court. 749 F.2d at 731-432 (Swygert, J.); 749 F.2d at 437 (Bauer, J.).

Judge Posner, concurring in the result, found no ineffectiveness by Elson. Instead he found "cause" in the "exquisite dilemma" Elson faced. 749 F.2d at 435. That dilemma was that (1) the trial court record did not reveal the incompetence of respondent's public defenders; (2) the amend-

ed motion to vacate was the only viable way to supplement the record; (3) the chief judge of the juvenile court had promised Elson an evidentiary hearing on his motion; and (4) an appeal would have deprived the juvenile court of jurisdiction to hear the motion.

> "There was no obvious way Elson could preserve both his (probably worthless) right to appeal and what seemed the much more promising option of a hearing on the amended motion to vacate."

749 F.2d at 436. Like the majority, Judge Posner identified "prejudice" as "denying Miss Clay access to federal habeas corpus," when she had

> pleaded guilty, almost certainly because she was incompetently represented by her first lawyer, Friedman -- for she had excellent defenses, state and federal, to the charges against her.

Id. at 436-37.

There is yet another ground for the Court of Appeals' decision. All three judges agreed that another principle of Engle applied to this case: "In appropriate cases [the] principles [of cause and prejudice] must yield to the imperative of a fundamentally unjust incarceration." 456 U.S. at 91, quoted at 749 F.2d at 433 (Swygert, J.). Judge Posner recognized that respondent's conviction was "almost certainly the result of [the public defender's] incompetence." Id. at 436. Judge Bauer called it a "relatively obvious miscarriage of justice," occasioned by "legal advice that seemed to have failed to grasp the handle of legal reality." Id. at 437.

The Court of Appeals' first opinion in the Clay case, 631 F.2d 516 (7th Cir. 1980), understandably omitted from petitioner's appendix, confirms the panel's unanimous belief that respondent's underlying conviction was a miscarriage of justice.

Respondent was defending her home and her family against a street-gang member suspected of setting fire to the Clay family's apartment building on previous occasions. When the police responded to respondent's call, they found gang members congregated around the building, throwing rocks at the windows. Yet they arrested respondent, and charged her with using a gun to commit aggravated battery.*

Assistant Public Defender Saul Friedman allowed respondent to admit to the charge without ever investigating the facts involved or the applicable law. Friedman labored, for example, under the illusion that defense of dwelling could not be invoked, because the suspected arsonist was trying to climb through a window into the abandoned first floor of the building, and Clay's family lived on the second floor. See 631 F.2d at 520.

Friedman later filed a motion to vacate the admission -- using a preprinted form which captured none of the grounds applicable to respondent's case. The task of presenting the motion fell to another public defender who knew nothing whatever about the case or the respondent, not even her sex. See 631 F.2d at 522-23.

In sum, there are three distinct relationales for the decision below, none accurately identified by the petitioner, and none involving any departure from this Court's teachings in Engle.

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* The charge was subsequently amended to aggravated assault (to reflect that respondent had not touched the "victim") with a kitchen knife (concededly, no gun was used).

2. The decision below applied the correct standard of review to the district court's grant of summary judgment.

Petitioner chides the Court of Appeals for not reviewing the district court's decision under an "abuse of discretion" standard. Though the argument is far from clear, the notion seems to be either (1) that reversing petitioner's summary judgment motion was tantamount to amending the pleadings, or (2) that the only issue on appeal was respondent's Rule 59(e) motion.

On either hypothesis, petitioner is mistaken. First, as petitioner admits (p. 14), "No formal motion to amend was ever filed in this case." The issue was waiver under Engle, not a belated attempt to plead a new theory of relief. No one has ever suggested, and petitioner did not argue below, that Elson bore any responsibility for the respondent's underlying, unconstitutional conviction.

Second, the appeal brought the entire case, not just the Rule 59(e) motion, to the Court of Appeals. In reviewing a grant of summary judgment, an appellate court engages in the same analysis as the trial court. That is, it resolves all factual issues in favor of the non-movant, and decides all questions of law for itself. Tymshare, Inc. v. Covell, 727 F.2d 1145, 1155 (D.C. Cir. 1984); Transource Intern, Inc. v. Trinity Industries, Inc., 725 F.2d 274, 279 (5th Cir. 1984); Ed Houser Enterprises, Inc. v. General Motors Corp., 595 F.2d 366, 368-69 (7th Cir. 1979).

There was one issue in the case on which the Court of Appeals' review was limited: the propriety of the district court's ruling on the Rule 59(e) motion itself. Given the Court's disposition of the case, the Rule 59(e)

ruling did not have to be addressed. It was, however, arbitrary for the district judge to tell Elson that a full exploration of his ineffectiveness was first premature and then overdue. 749 F.2d at 430 and 432-33.

This is a case in which the law has been correctly applied to extreme facts. It requires no correction by this Court.

**CONCLUSION**

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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